

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN B. SOLTIS and OFFICE OF PERSONNEL MANAGEMENT, SAN
FRANCISCO REGION, San Francisco, CA

*Docket No. 98-1119; Submitted on the Record;
Issued December 21, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation occurred in the amount of \$1,017.62 for March 22 through April 2, 1993; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery; and (3) whether the Office properly reduced appellant's continuing compensation by \$200.00 a month until the overpayment was recovered.

On May 9, 1991 appellant, then a 37-year-old personnel investigator, sustained cervical, dorsal and lumbar sprains in the performance of duty. The Office later expanded its acceptance of his claim to postconcussion syndrome, memory impairment, organic mood disorder and depression.

Appellant was off work from May 9 through June 6, 1991. He returned to work June 7, 1991 but missed intermittent periods of work through March 22, 1992. Appellant worked steadily from March 26 to December 1, 1992, when he suffered a recurrence of disability and stopped work. During these periods, appellant intermittently received continuation of pay, wage-loss compensation for time worked and leave pay. On March 21, 1993 appellant, who had been in leave without pay (LWOP) status since December 23, 1992, returned to work for one day to be eligible to use his accrued annual and sick leave.

On April 6, 1993 appellant completed a Form CA-8, Claim for Continuing Compensation, covering March 23 through April 30, 1993. Appellant indicated that he had received pay for annual and sick leave from March 24, 1992 through April 21, 1993. Appellant checked a box on the form indicating that he did not wish to repurchase leave.

In a signed statement dated April 30, 1993, appellant notified the Office that he had received pay for 80 hours of annual leave from March 24 to April 2, 1993; pay for 80 hours of leave from April 5 to April 16, 1993; eight hours of leave pay for April 19 and 20, 1993; and four hours of leave pay for April 21, 1993. On September 15, 1993, however, the employing

establishment faxed a daily work and leave breakdown to the Office, which incorrectly indicated that appellant had been in LWOP status from December 21, 1992 through April 2, 1993.¹

By letter dated September 30, 1993, the Office informed appellant that he was eligible to “buy back” 100 hours of sick and annual leave used from April 5, 1992 to April 21, 1993.

By check dated October 8, 1993, the Office paid appellant benefits in the amount of \$7,303.19.² A notation on the face of the check indicated that it was for “compensation from December 23, 1992 to April 3 1993.” By letter to appellant dated October 13, 1993, the Office confirmed this disbursement stating: “You were also issued a check in the amount of \$7,428.63³ for the period December 23, 1992 through April 3, 1993.”

In a letter dated December 8, 1993, memorializing a telephone conversation on November 30, 1993, the Office attempted to address appellant’s questions regarding leave buy back, noting that the dates for the leave buy back offered in the prior September 30, 1993 letter were incorrect and should have been April 5 to April 21, 1993. In a response dated December 15, 1993, appellant informed the Office that he had used approximately 200 hours of leave during the period December 23, 1992 to May 31, 1993 and would like to buy it back.

In a reply dated April 1, 1994, the Office informed appellant that his application for reinstatement of leave could not be processed because he was not offered leave buy back for the dates specified. The Office specifically stated: “This Office has already paid you temporary total disability from December 23, 1992 through April 3, 1993 in the amount of \$7,428.63. The check was issued on October 8, 1993.” The Office further informed appellant that the only period for which he had not received compensation was December 17 to 22, 1992. Appellant continued to pursue leave buy back for additional periods between December 1992 and May 1993 through numerous inquiries and letters. In at least five separate letters to appellant dated between May 25, 1994 and April 6, 1996, the Office explained that compensation for temporary total disability had already been paid for December 23, 1992 to April 3, 1993.

On March 17, 1997 the Office advised appellant that an overpayment of compensation had occurred in the amount of \$1,017.62 because appellant received pay for 80 hours of annual leave for March 2⁴ through April 3, 1993 and also received temporary total disability compensation for the same period. The Office added that it had made a preliminary finding that appellant was at fault in the creation of the overpayment because he had been informed by letter

¹ The record contains numerous subsequent submissions from both appellant and the employing establishment, including an earnings and leave statement for the relevant period, which confirms that appellant did receive pay for 80 hours of annual leave in the pay period ending April 2, 1993.

² A letter dated November 14, 1994 from the Office to appellant states that appellant was paid compensation for temporary total disability from December 23, 1992 through April 3, 1993, based on day-by-day breakdown of leave status faxed to the Office by the employing establishment on September 15, 1993. This fax incorrectly indicates that appellant was in LWOP status from December 21, 1992 through April 2, 1993.

³ This amount is incorrect. The check was in the amount of \$7,303.19.

⁴ This is a typographical error. The Office’s notations preceding this decision indicate that the period in question begins on March 21, 1993, not March 2, 1993.

dated April 1, 1994, that he had been paid temporary total disability from December 23, 1992 through April 4, 1993 and should have reasonably been aware that leave and workers' compensation benefits cannot be paid simultaneously. Appellant was advised that, if he disagreed with the decision, he could request a prerecoument hearing and submit new evidence or arguments.

On March 26, 1997 appellant requested an oral hearing and waiver of the overpayment. Appellant subsequently submitted a completed overpayment questionnaire, Form OWCP-20, containing information on monthly expenses and income and written statements contesting the Office's conclusions.

In his testimony at the hearing, held on September 22, 1997, appellant asserted that, while he was aware he could not receive leave pay and compensation for the same period, he was totally unaware that this had in fact occurred. Appellant added that it was not clear to him what specific periods were covered by the compensation check dated October 8, 1993, because each of his checks covered a "lumped together" period.

By decision dated December 12, 1997, an Office hearing representative found that an overpayment in the amount of \$1,017.62 had occurred that appellant was at fault in the creation of the overpayment and that he was not entitled to waiver of recovery of the overpayment.⁵

The Board finds that the Office properly determined that an overpayment of compensation occurred.

The record establishes that appellant received pay for 80 hours of annual leave in the pay period ending April 3, 1993 and total disability compensation for the same period. Therefore, the Office correctly determined that appellant received an overpayment in the amount of \$1,017.62 for March 21 to April 3, 1993.

The Board further finds that appellant was at fault in the creation of the overpayment of compensation.

Section 8129 of the Federal Employees' Compensation Act⁶ provides that an overpayment of compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience." Thus, the Office may not consider a waiver of the overpayment of compensation in this case unless appellant was without fault.

⁵ By letter dated December 31, 1997, appellant requested reconsideration of the Office decision and submitted additional evidence in support of his request. However, pursuant to 20 C.F.R. § 10.321(h), which provides that "the final decision concerning an overpayment, whether rendered subsequent to a prerecoument hearing or in the absence of the submission of additional written evidence, is not subject to the hearing provision of 5 U.S.C. § 8124(b) nor the reconsideration provision of 5 U.S.C. § 8128(a)," appellant had no right to reconsideration of the Office's December 12, 1997 decision.

⁶ 5 U.S.C. § 8129.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations provides that an individual is with fault in the creation of an overpayment who: made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or failed to furnish information which the individual knew or should have known to be material; or, with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.⁷ In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

With respect to whether an individual is without fault, section 10.320(c) provides that whether an individual is "without fault" depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual's understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which are not due and the ability to comply with any reporting requirements (*e.g.*, age, comprehension, memory, physical and mental condition).⁸

In this case, the circumstances surrounding the overpayment indicate that the Office properly determined that appellant was at fault in creating the overpayment. By letter dated April 1, 1994, the Office informed appellant that the check issued October 8, 1993 was for total disability compensation for December 23, 1992 to April 3, 1993. The record contains a copy of the October 8, 1993 check, which has on its face a notation stating that it covered the period December 23, 1992 to April 3, 1993. Similarly, the Office's October 13, 1993 letter referencing this check also indicates that it covers the same period. The fact that appellant requested, by letter dated December 15, 1993, to buy back approximately 200 hours of leave used from December 23, 1992 to May 31, 1993, further indicates that appellant was aware that he had already received payment from his employer, in the form of leave, for the period in question.⁹ Furthermore, appellant's testimony at the hearing confirmed his awareness that he could not receive leave pay and disability compensation for the same period. While appellant stated that, because each of his checks covered a "lumped together" period, it was not clear to him what specific periods were covered by the check dated October 8, 1993, the record contains at least five separate letters to appellant dated between May 25, 1994 and April 6, 1996, in which the Office clearly explained that compensation for temporary total disability had already been paid from December 23, 1992 to April 3, 1993. Therefore, appellant knew or reasonably should have known that he accepted an incorrect payment when he received the October 8, 1993 check. As appellant was at fault in the creation of the overpayment, waiver of recovery of the overpayment may not be considered.¹⁰

⁷ 20 C.F.R. § 10.320(b).

⁸ *Steven A. Berndt*, 51 ECAB ____ (Docket No. 98-2226, issued March 27, 2000).

⁹ Pay slips contained in the record reflect that appellant did receive pay for 80 hours of annual leave for the period ending April 3, 1993.

¹⁰ 5 U.S.C. § 8129.

The Board also finds that the Office properly required repayment by withholding \$200.00 from appellant's monthly continuing compensation.

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual.”¹¹

Based on appellant's information regarding his income, assets and expenses, the Office hearing representative decided to withhold \$200.00 from appellant's continuing compensation. Appellant reported at least \$2,800.00 a month in income and \$1,775.00 in ordinary and necessary living expenses, leaving more than \$1,000.00 in discretionary income. Therefore, the Board finds that the Office properly determined that recovery of the overpayment of compensation benefits would be obtained by withholding \$200.00 per month from appellant's continuing monthly compensation.

The decision of the Office of Workers' Compensation Programs dated December 12, 1997 is hereby affirmed.

Dated, Washington, DC
December 21, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹¹ 20 C.F.R. § 10.321(a); see *Donald R. Schueler*, 39 ECAB 1056, 1061-62 (1988).